

STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT – BUSINESS DOCKET
811 Port Street, St. Joseph, MI 49085 • (269) 983-7111 • businesscourt@berriencounty.org

SHANE McINTOSH,

Plaintiff,

Case No. 2021-000063-CB
HON. DONNA B. HOWARD

v.

**JIM BRENNAN, and MARK
FRANCESCHI,**

Defendants.

Stephen W. Smith (P70723)
Attorney for Plaintiff
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**ORDER AND OPINION REGARDING PLAINTIFF’S SECOND EX PARTE MOTION
FOR TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION**

At a session of the Berrien County Trial Court, held
On the 1st day of April, 2021, in the City of
St. Joseph, Berrien County, Michigan

This matter returns to the Court on Plaintiff’s second *ex parte* motion for temporary restraining order and injunctive relief, filed late March 31, 2021. Along with filing his initial pleadings, Plaintiff had previously filed for immediate injunctive relief on or about March 23 and 25, 2021. By written Opinion and Order date March 25, 2021, the Court denied in part the *ex parte* injunctive relief, namely halting a scheduled special meeting of the board of BSE-USA, Inc. (“the Company”), scheduled for March 26, 2021, yet scheduling a preliminary injunction hearing for April 14, 2021 (Opin&Order, 3/25/21, pp 3-4).

The standard of review by this Court, and applicable law for injunctive relief in the instant motion remains the same as that outlined in the Court’s March 25th Opinion, including but not limited to *Detroit Fire Fighters Ass’n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 34 (2008), and will be incorporated herein by reference (*see*, Opin&Order, 3/25/21, pp 2-3).

The Court, having reviewed Plaintiff's second *ex parte* motion for injunctive relief, and amended complaint, and having considered the prior filings, hereby finds on the existing record that Plaintiff has not sufficiently demonstrated the elements required for this Court to issue an *ex parte* restraining order. As before, Plaintiff has not yet demonstrated an imminent danger of irreparable injury. The majority if not all of the alleged harm, such as the "loss of his employment" and "ability to earn a livelihood," (Motion, 3/31/21, p 2) remains economic. That is, such harm is recoverable as monetary damages, and therefore, can arguably be remedied by damages at law. *See, Thermatool Corp v Borzym*, 227 MichApp 366, 377 (1998)(economic damages are not irreparable).

Second, there has not been a sufficient showing of evidence thus far of what other arguably non-economic harm (*e.g.* "damage to his reputation") is being caused to warrant an immediate *ex parte* restraining order. Other than the conclusory claim that irreparable harm is being suffered, the present record before the Court lacks the requisite showing of a particularized, immediate, real threat. For example, from the record there remains Plaintiff's anticipation of injury to his reputation, but without a showing by the evidentiary support suggestive after five or six days since the termination of harm to his reputation that is not speculative. *See, Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9-11 (2008)(speculative or potential injuries do not rise to level of irreparable or imminent harm).

As indicated in the Court's March 26th Opinion, the Court remains concerned about the ongoing actions of the Company shareholders to the extent it may affect the good will or solvency of the Company, and thereby the distribution and/or related "buy-out" of Plaintiff's shares described in the record filings. Understanding that the Court's analysis of Plaintiff's request for preliminary injunctive relief may change after proper notice to Defendants (and the non-party Company), and an opportunity to review additional evidence offered by all the parties at an evidentiary hearing, the Court further finds that Plaintiff's request for an evidentiary hearing is warranted on the balance of Plaintiff's motion for injunctive relief pursuant to MCR 3.310 (albeit not as one for "show cause" as coined by Plaintiff in his motion and brief). Consequently, that portion of Plaintiff's instant motion seeking an *ex parte* temporary restraining order, as proposed, is denied, but the request for a preliminary injunction is reserved pending an evidentiary hearing in which all of the parties, and if applicable, the Company, have an opportunity to participate. Therefore, this Court being otherwise advised in the premises holds as follows:

IT IS HEREBY ORDERED that that portion of Plaintiff's motion seeking an *ex parte* temporary restraining order is DENIED.

IT IS FURTHER HEREBY ORDERED that the balance of Plaintiff's motion for other preliminary injunctive relief is RESERVED for further evidentiary hearing, which shall proceed remotely on **April 14, 2021 at 9:00 a.m. (EST)**, before this Court, pursuant to MCR 3.310. Plaintiffs shall notice and serve all Defendants with the summons, amended verified complaint, instant *ex parte* motion, and brief for temporary restraining order and preliminary injunction, inclusive of all exhibits or attachment thereto, this Opinion and Order, and a Notice of Hearing, which will include instructions from the Court for all parties to proceed with the hearing remotely via Zoom®. Service on all Defendants shall be made by or before **April 5, 2021 at 5:00 (EST)**.

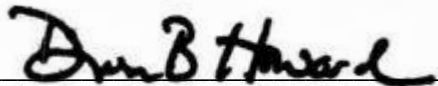
IT IS FURTHER HEREBY ORDERED that for purposes of any preliminary injunction hearing, service of filings described in the preceding section of this Order, including Notice of Hearing, shall also be served (electronic means will suffice, but is not required) to: *Attorney Stephen J. van Stempvoort, Miller Johnson, 45 Ottawa Avenue, Suite 1100, Grand Rapids, MI 49501-0306*, by or before **April 5, 2021 at 5:00 (EST)**.

IT IS FINALLY HEREBY ORDERED that Defendants, individually or collectively, are permitted, but not required, to file and serve a responsive brief to Plaintiff's motion no later than three (3) business days before the above scheduled evidentiary hearing. The requisite Judge's Copy, only, of briefs may be served electronically by emailing to: businesscourt@berriencounty.org. All other filings for the Court record directed to the Court Clerk must be timely made in hard-copy form.

IT IS SO ORDERED.

This is not a final order and does not close the case.

DATE: April 1, 2021



Honorable Donna B. Howard (P57635)
Berrien County Trial Court – Business Docket